

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

In re Marriage of

ROBERT B. MILLMAN

Appellant,

and

LINDA M. JOSEPHSON,

Respondent.

) No. 63044-0-I

)

) UNPUBLISHED OPINION

)

)

)

)

)

)

)

)

)

)

FILED: March 1, 2010

\_\_\_\_\_  
—

Schindler, C.J. — Robert B. Millman contends the court erred by using the economic table for a two child family instead of a three child family in determining the child support obligation for the parties' two minor children and excluding from the calculation the parties' eldest child, who is dependent and receives support for postsecondary educational expenses. We agree, reverse the order adjusting child support, and remand.

**FACTS**

Robert Millman and Linda Josephson were married in 1986 and have three children L.M., born June 19, 1995, Z.M., born August 28, 1992, and E.M., born June 7,

1990. The parties divorced in 2001. The parents' combined monthly net income exceeded \$7,000. Based on each parent's net income, Millman's proportional share of the child support obligation was 64 percent and Josephson's was 36 percent. In the child support order, the parties agreed to pay postsecondary educational support for their three children and to establish an education trust for college expenses.

The eldest child graduated from high school in 2008, and enrolled in college in September 2008. In December, Josephson filed a motion for an adjustment in child support based on the change in the age category for the children. Josephson asserted that because their eldest child was attending college, the new child support obligation for the two minor children should be based on a two child family calculation.

There is no dispute that the eldest child's postsecondary educational expenses are being paid by the college education trust. Josephson also does not dispute Millman's assertion that he funded the trust with his "post-separation earnings which were placed into a Trust established to fund the children's college education."

The parties stipulated that their combined monthly net incomes exceed \$7000 and that Millman's proportional share of the child support obligation was 66.4 percent and Josephson's was 33.6 percent. However, Millman disagreed with Josephson's position that the child support obligation should be based on the economic table for a two-child family. He asserted that the calculation should include their eldest child attending college and the court should use the economic table amount for a three-child family.

The court rejected Millman's position.<sup>1</sup> In the "Order re Adjustment of Child Support," the court ruled:

While the court at times follows the dicta in Daubert and includes children from college in calculating support, in this case the parties prefunded college [and] no monthly payment is outgoing by the father. Therefore, in this case a two-child family calculation is appropriate.

Millman appeals.<sup>2</sup>

### ANALYSIS

Millman contends the court erred in calculating the child support obligation by using the two-child family calculation from the economic table and excluding the parties' eldest child who is receiving postsecondary educational support from the calculation.

We review child support adjustments for a manifest abuse of discretion. In re Marriage of Booth, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). To succeed on appeal the appellant must show that the trial court's decision was manifestly unreasonable, or based on untenable grounds or reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal

---

<sup>1</sup> The court denied Millman's request to revisit the allocation for the cost of medical insurance coverage, and his request to deviate from the standard calculation because of a child from his second marriage. On the other hand, the court denied Josephson's request to change the allocation of the tax exemptions. The court ruled that Millman is entitled to claim the oldest child and the youngest child as tax exemptions, and Josephson is entitled to claim the middle child as agreed to in the 2001 child support order. These decisions are not challenged on appeal.

<sup>2</sup> Josephson did not file a response brief.

standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn. 2d 39, 47, 940 P.2d 1362 (1997). “A court necessarily abuses its discretion if its decision is based on an erroneous view of the law.” In re Marriage of Scanlon, 109 Wn. App. 167, 174-75, 34 P.3d 877 (2001).

The trial court determines the basic child support obligation from the economic table as set forth in RCW 26.19.020, based on the parents' combined monthly net income and the age and number of children for whom support is owed. The only issue here is whether the court erred in determining the child support obligation by using the economic table for a two-child family, rather than a three-child family. There is no dispute that the parties' eldest child is attending college and is dependent on her parents for support. Nor is there any dispute that the parents agreed to contribute to their children's postsecondary educational expenses and fund a trust for that purpose. Further, Millman's assertion that he funded the trust with his separate earnings is uncontested.

Relying on In re Marriage of Daubert, 124 Wn. App. 483, 99 P.3d 401 (2004), overruled on other grounds by In re Marriage of McCausland, 159 Wn.2d 607, 152 P.3d 1013 (2007),<sup>3</sup> Millman contends that in calculating the basic support obligation for

---

<sup>3</sup> McCausland 159 Wn.2d at 620, overruled Daubert to the extent that the decision approved of extrapolation for incomes exceeding the economic table.

the two younger children, the court must include a college-age dependent child in the calculation even though the college expenses are being paid for by the trust. Because there is no dispute that Millman's eldest child is dependent and is receiving support for her educational expenses, Millman contends that the court erred in using the economic table for a two-child family in calculating the child support obligations.

In deciding whether to order support for postsecondary educational expenses, the court must first determine "whether the child is in fact dependent" and is relying on the parents for support. RCW 26.19.090(2). The court then exercises its discretion in deciding whether and for how long to award postsecondary educational support. RCW 26.19.090(2) provides, in pertinent part:

(2) When considering whether to order support for postsecondary educational expenses, the court shall determine whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life. The court shall exercise its discretion when determining whether and for how long to award postsecondary educational support based upon consideration of factors that include but are not limited to the following: Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together.

In Daubert, when the court entered the order modifying child support, one of the two children had recently graduated from high school and was planning to attend college. The court increased the amount of support for the youngest child, and

awarded postsecondary educational support for the college-age child. With respect to postsecondary educational support, the parties did not challenge the court's decision to award support or the amount of support awarded. The mother challenged the 50/50 allocation on appeal, arguing that it should have been apportioned according to the same percentages used to apportion the basic child support obligation.

We held that postsecondary educational support is child support that must be apportioned according to the net income of the parents. Daubert, 124 Wn. App. at 505. We further held that “when calculating support for the younger minor children, the schedule applies and requires consideration of the postsecondary child, because this child is still a child receiving support.” Daubert, 124 Wn. App. at 503. In a footnote, the Daubert court noted that the trial court calculated the child support for the youngest child under the economic table for a one child family even though the college-age child “was still receiving postsecondary child support.” Daubert, 124 Wn. App. at 503, n.3. While the footnote suggests that use of the economic table for a one child family was error, the parties did not appeal that determination. Daubert, 124 Wn. App. at 503, n.3.

Here, even though the eldest child's college expenses are paid by the trust, there is no dispute that the child is “in fact dependent” and that Millman's separate earnings were used to fund the trust that is paying for college expenses. On this record, we conclude that the court erred in using the economic table for a two child instead of a three child family, and excluding the college-age child receiving support, in calculating the child support obligation for the two younger children.

Because the court based the child support amount on a two child family and excluded the dependent child attending college contrary to RCW 26.19.090, we reverse and remand.

Schindler, C.J.

WE

CON

Dwyer, A.C.J.

CUR:

Leach, J.